

# South Dakota Public Utilities Commission

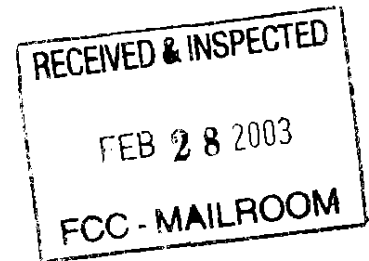
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State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

February 26, 2003

Marlene H. Dortch, Secretary  
445 12th Street, SW  
CY-B402  
Washington, D.C. 20554



RE: *Application of Qwest Communications International, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota, WC Docket No. 03-11*

Dear Ms. Dortch:

Enclosed are an original and four copies, plus a computer diskette, of the South Dakota Public Utilities Commission's ("SDPUC") reply comments regarding its recommendation to the FCC concerning the above-entitled docket. In addition, the SDPUC has attached its latest order regarding this matter.

If you have any questions regarding our proceeding or orders, please do not hesitate to contact me.

Sincerely,

*Rolayne Ailts Wiest*

ROLAYNE AILTS WIEST  
Commission Attorney

enc.

*File in Qwest record 0+4*

Capitol Office  
Telephone (605) 773-3220  
Fax (605) 773-3809

Transportation  
Warehouse Division  
Telephone (605) 773-5286  
Fax (605) 773-3225

Consumer Hotline  
1-800-432-1182

TTY Through  
Relay South Dakota  
1-800-877-1413

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www.state.sd.us/puc

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the matter of )

)  
Application by Qwest )  
Communications International, Inc. )  
for Authorization to Provide In- )  
Region, InterLATA Services in New )  
Mexico, Oregon and South Dakota )

WC Docket No. 03-11

February 26, 2003

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**REPLY COMMENTS OF THE PUBLIC UTILITIES COMMISSION  
OF SOUTH DAKOTA**

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Robert K. Sahr  
Chairman

Gary Hanson  
Commissioner

James A. Burg  
Commissioner

South Dakota Public Utilities  
Commission  
500 East Capitol  
Pierre, SD 57501  
(605) 773-3201

## EXECUTIVE SUMMARY

The South Dakota Public Utilities Commission ("SDPUC") recommends that the Federal Communications Commission ("Commission") grant the application of Qwest Communications International, Inc. ("Qwest") for authority under section 271 of the Telecommunications Act of 1996 to provide in-region, interLATA services in the state of South Dakota. The SDPUC bases this recommendation on the record developed in its section 271 proceeding, Docket TC01-165, Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act of 1996. As noted in more detail below, the SDPUC has issued numerous orders with detailed findings regarding disputed issues raised by the intervenors and the SDPUC Staff. Most of these orders were contained in Qwest's application to the Commission, and, therefore, are already in the record. Since Qwest filed its application, the SDPUC has issued two more orders. The first order was attached to the SDPUC's initial comments. The SDPUC's second order is attached to these comments.

## PROCEDURAL HISTORY OF PROCEEDINGS BEFORE THE SDPUC

On October 25, 2001, Qwest filed with the SDPUC a Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act of 1996. Specifically, Qwest requested that the SDPUC find that Qwest has met the competitive checklist and other requirements of 47 U.S.C. section 271, which prescribe the mechanism by which Qwest may be found eligible to provide in-region, interLATA services. Qwest requested that the SDPUC provide a favorable recommendation to the Commission. In support of its petition, Qwest submitted 25 affidavits, a revised Statement of Generally Available Terms ("SGAT"), and seven reports submitted in the Multi-state Proceeding.

Intervention was granted to Black Hills FiberCom, L.L.C., Midcontinent Communications, and AT&T Communications of the Midwest, Inc. on November 27, 2001. A hearing was held beginning on April 22, 2002 and ending on April 30, 2002. A hearing on OSS issues was held on July 11, 2002. After extensive briefing, the SDPUC issued the following orders.

On September 19, 2002, the SDPUC issued its order concerning checklist items 3, 7, 8, 9, 10, and 12. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Procedural History*; Order Regarding Checklist Items 3, 7, 8, 9, 10, and 12, Docket TC01-165, issued September 19, 2002. The SDPUC found that, subject to its findings regarding the OSS results, Qwest was in substantial compliance with checklist items 7, 8, 9, 10, and 12. The SDPUC further found that Qwest was in substantial compliance with checklist item 3, subject to Qwest making certain revisions. On September 25, 2002, Qwest submitted a revised SGAT with the SDPUC's required revisions.

On September 19, 2002, the SDPUC issued its order concerning checklist items 1, 11, 13, and 14. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 1, 11, 13, and 14*, Docket TC01-165, issued September 19, 2002. The SDPUC found that Qwest was in substantial compliance with checklist items 1, 11, 13, and 14, subject to the SDPUC's review of the OSS results. On September 25, 2002, Qwest submitted a revised SGAT with the SDPUC's required revisions.

On November 12, 2002, the SDPUC issued its order concerning checklist items 2, 4, 5, and 6. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 2, 4, 5, and 6*, Docket TC01-165, issued November 12, 2002. The SDPUC found that, subject to its findings regarding Qwest's

OSS results, Qwest was in substantial compliance with checklist items 2, 5, and 6. In order for the SDPUC to find that Qwest was in substantial compliance with checklist item **4**, **Qwest** was required to make a number of revisions. On November 18, 2002, Qwest submitted a revised SGAT with the SDPUC's required revisions.

On November 12, 2002, the SDPUC issued its order concerning the general terms and conditions of the SGAT and Track A compliance. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, Order Regarding General Terms and Conditions and Track A, Docket TC01-165, issued November 12, 2002. The SDPUC found that Qwest had met the Track A requirements. In order for the SDPUC to find that Qwest was in substantial compliance with respect to its provisions concerning general terms and conditions, Qwest was required to make a number of revisions. On November 18, 2002, Qwest submitted a revised SGAT with the SDPUC's required revisions.

On November 22, 2002, the SDPUC issued its order Concerning Qwest's OSS, the ROC OSS Test, and Qwest's commercial performance data. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, Order Regarding Operational Support Systems, ROC OSS Test, and Commercial Performance Data, Docket TC01-165, issued November 22, 2002. The SDPUC found that when the results of the ROC OSS test and Qwest's commercial performance data were viewed in their entirety, Qwest had demonstrated that it had substantially met the statutory and FCC standards concerning OSS.

On November 22, 2002, the SDPUC issued its order concerning whether Qwest's entry into the interLATA market was in the public interest. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, Order Regarding the Public Interest, Docket TC01-165, issued November 22, 2002. In that order, the SDPUC addressed issues regarding Qwest's unfiled interconnection agreements, "price squeeze" issues, and Qwest's Performance Assurance Plan. The SDPUC found that in order for the SDPUC to find that Qwest's section 271 application was in the public interest, Qwest was required to make a number of revisions to its QPAP.

On December 13, 2002, Qwest filed its revised SGAT and QPAP. On December 16, 2002, Qwest filed a notice of errata to its SGAT. Qwest stated that it had included "alternative" language regarding three areas in the QPAP. On December 23, 2002, AT&T filed its Response to Qwest Corporation's Notice of Updated Statement of Generally Available Terms and Conditions in this Matter. AT&T objected to some of Qwest's "alternative" QPAP language. On January 21, 2003, SDPUC Staff filed a response. In a letter dated January 27, 2003, the SDPUC asked Qwest to explain why it had made, or failed to make, changes to the QPAP without any accompanying explanation. On January 28, 2003, Qwest filed its Reply to the SDPUC Staffs Response to Qwest Corporation's Notice of Generally Available Terms and Conditions. On January 30, 2003, Qwest submitted a letter response to the SDPUC's January 27, 2003, letter.

On February 4, 2003, the SDPUC issued its order concerning Qwest's compliance filings and its recommendation to the Commission. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, Order Regarding Compliance *Filings* and Recommendation *to the FCC*, Docket TC01-165, issued February 4, 2003. The SDPUC submitted this order to the Commission as its comments on February 4, 2003. The SDPUC found that, based on its previous orders, Qwest had met the 14 point checklist. The SDPUC further found that Qwest had met the conditions of Track A. The SDPUC also noted that it had declined to make any findings on whether Qwest has complied with the section 272 requirements.

With respect to compliance with its Order Regarding the Public Interest, the SDPUC noted specific areas where Qwest did not comply with the SDPUC's order. Based on those areas of noncompliance, the SDPUC was unable to recommend to the Commission that the granting of section 271 approval to Qwest in South Dakota was in the public interest. The SDPUC directed Qwest to make the changes as specified in its February 4, 2003, order. On February 17, 2003, the SDPUC received Qwest's revised QPAP.

On February 26, 2003, the SDPUC issued its order concerning Qwest's compliance filing and its final recommendation to the Commission. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, Order Regarding Public Interest Compliance Filing and Final Recommendation to the FCC. Docket TC01-165, issued February 26, 2003. (Attached as Appendix A.) The SDPUC found that Qwest's entry into the in-region interLATA market was in the public interest. The SDPUC further found that it would recommend to the Commission that the Commission grant Qwest's application for authority under section 271 to provide in-region interLATA service in the state of South Dakota.

### COMMENTS

The SDPUC first notes that in its initial comments to the Commission, the SDPUC was unable, at that time, to provide a favorable recommendation to the Commission. The SDPUC pointed out that its 271 proceedings were not yet completed. As its initial comments, the SDPUC submitted its most recent order which required Qwest to make further changes to its QPAP. In that order, the SDPUC noted a number of areas where Qwest had not complied with the SDPUC's Order Regarding the Public *Interest*. One of the areas of noncompliance concerned the cap on liability. The SDPUC had required no cap but Qwest had instead inserted an initial cap on annual liability of 36% of the prior year's ARMIS results. Based on the Commission's stance on this issue and Qwest's continuing concerns regarding a QPAP without any limitation of financial liability, the SDPUC modified its decision on this issue and required Qwest to place language in the cap section that provides for a floor of \$15,000,000.00. This would mean that the limit on liability would be 36% of the prior year's ARMIS net return, or \$15,000,000.00, whichever is greater. A second area of noncompliance concerned section 15.2 of the audit section. Qwest proposed alternative language and the SDPUC agreed to this alternative language. A third area of noncompliance involved the six month review provisions. The SDPUC continued to require Qwest to use the language that the SDPUC had ~~is~~ ordered, which was modeled on language in the New Mexico QPAP. A fourth area of noncompliance regarded Qwest's removal of language regarding the South Dakota Discretionary Fund which would be funded by Tier 2 payments. Qwest stated that it had assumed that the SDPUC wanted this language removed. The SDPUC clarified that it did not require the removal of this language. The SDPUC also pointed out other areas where changes were made or not made by Qwest.

In its February 17, 2003, compliance filing, Qwest stated that it had complied with the SDPUC's February 4, 2003, order but had also added one paragraph. The added paragraph stated as follows:

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

With these comments, the SDPUC submits its final order in its 271 proceeding. See Appendix A (In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, Order Regarding Public *Interest* Compliance Filing and Final Recommendation to the FCC, Docket TC01-165, issued February 26, 2003). In this order, the SDPUC found that Qwest has complied with the SDPUC's previous order and further found that the addition of section 16.1.2 does not significantly impair the SDPUC's ability to make changes to the QPAP, if necessary. As noted in the order, a party always has the opportunity to raise the **issue** of jurisdiction. Thus, the SDPUC found that Qwest's entry into the interLATA market in South Dakota is in the public interest. The SDPUC further found that it would recommend that the Commission approve Qwest's section 271 application regarding South Dakota.

### CONCLUSION

For the reasons set forth above and based on all of its orders, the SDPUC recommends that the Commission approve Qwest's application for authority under section 271 of the Telecommunications Act of 1996 to provide in-region interLATA services in the state of South Dakota.

Respectfully submitted,

  
ROLAYNE AILTS WIEST  
SDPUC Attorney  
Public Utilities Commission  
500 E. Capitol  
Pierre, SD 57501  
(605)773-3201

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE ANALYSIS OF</b>	)	<b>ORDER REGARDING</b>
<b>QWEST CORPORATION'S COMPLIANCE</b>	)	<b>PUBLIC INTEREST</b>
<b>WITH SECTION 271(c) OF THE</b>	)	<b>COMPLIANCE FILING AND</b>
<b>TELECOMMUNICATIONS ACT OF 1996</b>	)	<b>FINAL RECOMMENDATION</b>
	)	<b>TO THE FCC</b>
	)	<b>TC01-165</b>

On October 25, 2001, Qwest Corporation ("Qwest") filed with the South Dakota Public Utilities Commission ("Commission") a Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act Of 1996. Specifically, Qwest requested that this Commission find that Qwest has met the competitive checklist and other requirements of 47 U.S.C. section 271, which prescribe the mechanism by which Qwest may be found eligible to provide in-region, interLATA services. Qwest requested that the Commission provide a favorable recommendation to the Federal Communications Commission (FCC). In support of its petition, Qwest submitted 25 affidavits, a revised Statement of Generally Available Terms ("SGAT"), and seven reports submitted in the Multi-state Proceeding.

Intervention was granted to Black Hills FiberCom, L.L.C., Midcontinent Communications, and AT&T Communications of the Midwest, Inc. on November 27, 2001. A hearing was held beginning on April 22, 2002 and ending on April 30, 2002. A hearing on OSS issues was held on July 11, 2002.

Following the hearings, the Commission issued a number of orders regarding the checklist items and other related issues. Pursuant to some of the orders, Qwest was required to make revisions to its SGAT and QPAP. On February 4, 2003, the Commission issued its order concerning Qwest's compliance filings and its recommendation to the FCC. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Compliance Filings and Recommendation to the FCC*, Docket TC01-165, issued February 4, 2003. The Commission found that, based on its previous orders, Qwest had met the 14 point checklist. The Commission further found that Qwest has met the conditions of Track A. The Commission also noted that, for the reasons stated in its section 272 order, the Commission declined to make any findings on whether Qwest has complied with the section 272 requirements.

With respect to the public interest issue, the Commission still had concerns about specific areas where Qwest did not comply with the Commission's order. Based on those concerns, the Commission was unable to recommend to the FCC, in that order, that the granting of section 271 approval to Qwest in South Dakota was in the public interest. The Commission directed Qwest to make the changes as specified in its February 4, 2003, order and, upon the making of those changes, the Commission would then recommend to the FCC that it would be in the public interest to grant Qwest section 271 approval. The Commission ordered Qwest to file its revised QPAP on or before February 17, 2003.

On February 17, 2003, the Commission received Qwest's revised QPAP. In its Notice of Compliance Filing For Qwest Performance Assurance Plan, Qwest stated that it had complied with the Commission's February 4, 2003, order but had also added one paragraph. The added paragraph states as follows:

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

At its February 20, 2003, meeting, the Commission considered this matter. After listening to comments from the parties, the Commission voted to find that Qwest's section 271 application to the FCC is in the public interest. The commission finds that Qwest has complied with the Commission's previous order and further finds that the addition of section 16.1.2 does not significantly impair the Commission's ability to make changes to the QPAP, if necessary. The Commission notes that a party always has the opportunity to raise the issue of jurisdiction. Thus, the Commission recommends that the FCC approve Qwest's section 271 application regarding South Dakota.

It is therefore

ORDERED, that the Commission finds that Qwest's entry into the interLATA market in South Dakota is in the public interest; and it is further

ORDERED, that the Commission recommends to the FCC that the FCC grant the application of Qwest for authority under section 271 of the Telecommunications Act of 1996 to provide in-region interLATA services in the state of South Dakota.

Dated at Pierre, South Dakota, this 26<sup>th</sup> day of February, 2003

CERTIFICATE OF SERVICE
The undersigned hereby Certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.
By: <u>Helaine Kolbo</u>
Date: <u>2/26/03</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Robert K. Sahr

ROBERT K. SAHR, Chairman

Gary Hanson

GARY HANSON, Commissioner

James A. Burg

JAMES A. BURG, Commissioner



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